

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERCY LEE OLIVER,

Defendant-Appellant.

UNPUBLISHED

May 20, 2021

No. 352702

Jackson Circuit Court

LC No. 18-005048-FC

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

Defendant, Percy Lee Oliver, appeals his convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c); unlawful imprisonment, MCL 750.349b(1); and assault by strangulation, MCL 750.84(1)(b). Oliver was sentenced to 15 to 30 years’ imprisonment for the CSC-I conviction, to 4 to 15 years’ imprisonment for the unlawful imprisonment conviction, and to 4 to 10 years’ imprisonment for the assault by strangulation conviction. We affirm.

I. BACKGROUND

On August 27, 2018, the victim, who was a crack cocaine user, received several telephone calls from Oliver. Oliver invited the victim to the home of a mutual friend named Jason Rogers. Oliver offered to pay for the victim’s transportation and for crack cocaine. After the victim arrived, Oliver asked the victim if she would have a “threesome” with him and Rogers in exchange for money. The victim declined the offer. However, Oliver persisted, and Rogers eventually provided the victim with what he claimed to be crack cocaine. After attempting to smoke it, the victim realized that the substance was not crack cocaine and noted this to Oliver and Rogers. As the victim got up to leave, Oliver hit the victim in the back of the head, and the two began to “tussl[e]” on the ground. The victim attempted to call 911 on her cell phone, but Oliver took the phone away from her. Oliver strangled the victim “to the point where [she] peed on [herself]” and passed out. When the victim regained consciousness, she realized that she had tape over her mouth and that she was bound to a chair with tape. According to the victim, Oliver was talking about how “some people wanted [her] dead” because she had taken someone else’s property. Rogers and Oliver

discussed killing the victim, but promised not to do so if she had a threesome with them and then left town.

Oliver eventually removed the tape from the victim, took the victim to the bathroom, and instructed the victim to remove her clothing. The victim complied and then got into the shower to bathe. After a period of time, Oliver “snatched [the victim] out of the shower” and took her into a bedroom. Oliver sat on the bed, “pushed [the victim’s] head down to his penis,” and forced the victim to perform fellatio. Rogers later entered the room and penetrated the victim’s vagina with his finger. However, after stating “I can’t do this,” Rogers left the room. After Oliver ejaculated, the victim was able to retrieve her phone and ask her sister for help via text message. The victim’s sister contacted law enforcement, who arrived at and subsequently searched Rogers’s home. In relevant part, members of law enforcement located pieces of tape that had human hair attached to them and drug paraphernalia. Law enforcement also located jeans that were soaked in urine in the bathroom and a pellet gun in the bedroom where the sexual assault occurred.

The victim was taken to the hospital for a medical examination. Dr. Peter Plumeri noted that the victim had some marks on her neck and an abrasion on her forehead. Adrienne Cognata, a sexual assault nurse examiner, felt swelling on the back of the victim’s head and noted multiple injuries to the victim’s arms, some of which were consistent with being grabbed forcefully. Cognata also noted the victim had symptoms of having been strangled, including a raspy voice and loss of bladder control, and that the victim had scrapes and bruising on her neck.

Oliver was arrested and charged with CSC-I, unlawful imprisonment, and assault by strangulation. DNA samples were taken from Oliver and the victim. After testing was complete, it was determined that there was very strong support that swabs from the tape found in Rogers’s home contained DNA belonging to the victim and to Oliver. There was also strong support that the DNA from the victim’s oral swab contained DNA from Oliver and that the victim had contributed to DNA collected from Oliver’s penile swab.

Trial commenced in October 2019. Oliver testified on his own behalf. According to Oliver, the victim agreed to have sex with him in exchange for crack cocaine. Oliver testified that, after the victim arrived at Rogers’s house, Oliver discovered that the crack cocaine provided by Rogers was fake. Based on this and several other factors, Oliver wanted the victim to leave. When the victim refused and became aggressive, Oliver threw the victim onto the ground and put tape over her mouth in order to scare her. Oliver denied putting his hands or arms around the victim’s neck, denied placing tape on the victim’s hands or arms, and denied knowing how the victim had hit her head. Oliver also denied forcing the victim to have sex with him. Instead, Oliver testified that, after the altercation, the victim agreed to have sexual contact with him and Rogers in exchange for Rogers paying the victim \$75. According to Oliver, Rogers later declined to pay the victim and Oliver, who had only \$13 at the time, was unable to compensate her.

Oliver was convicted as charged and was sentenced as described above. This appeal followed.

II. PROSECUTORIAL ERROR

Oliver argues that he is entitled to his convictions being vacated because the prosecutor deprived him of a fair trial by asking Oliver to comment on the credibility of several witnesses, including the victim. We disagree that Oliver is entitled to a new trial.

A. PRESERVATION, STANDARD OF REVIEW, AND RELEVANT AUTHORITY

Because defense counsel did not object to the prosecutor's questions and request a curative instruction, the issue is unpreserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Unpreserved issues regarding prosecutorial error are reviewed "for outcome-determinative, plain error." *Id.* "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error has affected a defendant's substantial rights when there is "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Moreover, "once a defendant satisfies these three requirements, . . . [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citation omitted; second alteration in original). A defendant "bears the burden of persuasion with respect to prejudice." *Id.* at 763.

"A prosecutor has committed [error] if the prosecutor abandoned his or her responsibility to seek justice and, in doing so, denied the defendant a fair and impartial trial." *People v Lane*, 308 Mich App 38, 62; 862 NW2d 446 (2014). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). "Issues of prosecutorial [error] are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64. "The propriety of a prosecutor's remarks depends on all the facts of the case. A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id.* (quotation marks and citation omitted).

A prosecutor may not ask a defendant to comment on the credibility of the prosecution's witness because the defendant's opinion on the witness's credibility is not probative. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Loyer*, 169 Mich App 105, 116-117; 425 NW2d 714 (1988). As the finder of fact, the jury determines whether a witness is credible. See *Dobek*, 274 Mich App at 71. On the other hand, it is not improper for a prosecutor to ask a defendant whether the defendant has a different version of the facts in order to ascertain which facts are in dispute. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

B. ANALYSIS

In this case, the prosecutor's alleged improper questioning occurred during cross-examination of Oliver. Importantly, before the challenged questioning occurred, Oliver testified that the victim had engaged in consensual sex with him, and Oliver denied putting his hands or his

arms around the victim's throat. Oliver also denied placing tape on the victim's hands or wrists. The following line of questioning then occurred:

The Prosecutor: Okay. So according to you when [Rogers] gets up there he's not being a truth teller. Right?

Oliver: Correct.

The Prosecutor: And according to you when [the victim] gets up there she's not being a truth teller. Correct?

Oliver: Correct.

* * *

The Prosecutor: So after you pay the woman [who transported the victim to Rogers's home,] you've got your \$13,00 [sic] now.

Oliver: Yes.

The Prosecutor: Okay. And that's not enough to pay [the victim] or to get the crack cocaine for her according to you.

Oliver: No.

The Prosecutor: Okay. [The victim] is lying. [Rogers] is lying. Are the, are the doctors lying when they talk about all the strangulation marks that she's got on her neck?^[1]

Oliver: I can't determine that.

The Prosecutor: Okay. Are Ms. Cognata and Detective [Joseph] Merritt lying when they talk about all the strangulation stuff and how urination is, is a symptom and a, a result of strangulation, are, are they lying about that?

Oliver: I can't determine that as, as well either.

The Prosecutor: Okay. But you clearly disagree with them.

Oliver: Yes.

The Prosecutor: So you, who are [sic] a self proclaimed crack user, meth user,^[2] were prepared to deal for sex, you're the one who is being truthful today?

¹ Contrary to the prosecutor's question, only one doctor testified at trial.

² Oliver testified that he had consumed four "lines" of methamphetamine on August 27, 2018.

Oliver: Yes.

The Prosecutor: And this week?

Oliver: Yes.

The Prosecutor: Officer [Alexander] Norris, when he talks about when [the victim] leaves [the house] is physically shaking—and we all watched that body cam. She is physically shaking. Is he lying too?

Oliver: As far as what?

The Prosecutor: That she was physically shaking when she ran out of that house.

Oliver: (No audible response)

The Prosecutor: I mean—

Oliver: She—

The Prosecutor: —you make it seem like she was just fine.

Oliver: She was fine at, at points and they's [sic] been points where—

The Prosecutor: Okay.

Oliver: —she wasn't fine.

The Prosecutor: So at what points was she not fine. Was that the point where you had your penis in her mouth? Was that a point that she was not fine and not okay with what was going on?

Oliver: That was a point where she was fine.

The Prosecutor: Okay. How does one determine. You just had her tied up a few minutes ago. But now she's magically fine. She's A-okay with everything.

Oliver: I can't, 'cause I, I can't read her mind as far as her mental state as far as fine. But as far on the, the appearance, yeah, she looked fine.

The Prosecutor: You know you've known her for a long time.

Oliver: Yeah.

The Prosecutor: Yup.

Oliver: When I was talkin' to her . . . about the, about the \$75.00 that [Rogers] would pay her she was fine.

As already stated, it is “improper for the prosecutor to ask [a] defendant to comment on the credibility of prosecution witnesses.” *Buckey*, 424 Mich at 17. In *Buckey*, portions of the defendant’s testimony conflicted with the testimony of the complainant, eyewitnesses, and a police detective. *Id.* at 5-6, 7 n 3. The prosecutor asked the defendant during cross-examination whether the defendant thought the prosecution’s witnesses “were lying.” *Id.* at 7 n 3, 16-17. The *Buckey* Court noted that the prosecutor’s strategy was to invite the defendant to label the prosecution’s witnesses as liars and thereby discredit the defendant. *Id.* at 17. The *Buckey* Court found that the prosecutor’s question was improper because a defendant’s opinion of witnesses’ credibility “is not probative of the matter.” *Id.* However, the *Buckey* Court held that the error did not result in unfair prejudice to the defendant. *Id.* Specifically, the *Buckey* Court reasoned that “the substance of the exchange indicate[d] that [the] defendant dealt rather well with the questions[,]” that defense counsel did not object to the questions, and that any prejudice could have been cured by a timely objection resulting in a prohibition on further questions of the type at issue or an appropriate cautionary instruction. *Id.* at 17-18.

Even if we were to conclude that the prosecutor improperly asked Oliver about whether he thought that several witnesses had lied in order to invite Oliver to label the witnesses as liars and thereby discredit Oliver, Oliver would not be entitled to the relief that he seeks. Like the defendant in *Buckey*, 424 Mich at 17, “the substance of the exchange indicates that [Oliver] dealt rather well with the [prosecutor’s] questions.” Indeed, Oliver indicated that he was being truthful and at times evaded the prosecutor’s questions concerning the credibility of certain witnesses by noting that he could not determine if the witnesses were lying. Oliver agreed that he merely disagreed with certain witnesses. Oliver then reiterated on re-direct examination that the victim agreed to engage in sexual acts with him in exchange for money. Like the defendant in *Buckey*, we fail to discern how Oliver was harmed by the prosecutor’s questions. Additionally, given the evidence in this case, there is no basis to conclude that the prosecutor’s questioning resulted in the conviction of an actually innocent defendant or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Importantly, the trial court instructed the jury that it alone was to determine the facts and credibility of the witnesses. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Consequently, Oliver is not entitled to relief under plain-error review.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Oliver argues that he was denied his right to the effective assistance of counsel because defense counsel failed to object to the prosecutor questioning Oliver about the credibility of certain witnesses. We conclude that Oliver is not entitled to relief on this issue.

A. PRESERVATION, STANDARD OF REVIEW, AND RELEVANT AUTHORITY

Oliver failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial, and this Court denied Oliver’s motion for remand to the

trial court for a *Ginther*³ hearing.⁴ “Therefore, our review is for errors apparent on the record.” See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8, lv pending.

The Sixth Amendment of the United States Constitution guarantees that criminal defendants receive effective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed2d 674 (1984). To demonstrate ineffective assistance of counsel,

a defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [*Abcumby-Blair*, ___ Mich App at ___; slip op at 8 (quotation marks and citations omitted).]

B. ANALYSIS

We conclude that there is not a reasonable probability that, but for defense counsel’s error by failing to object, the result of the proceedings would have been different. The victim testified in detail about the crimes, and her testimony was corroborated by DNA evidence, physical evidence, and the testimony of Rogers, who testified as part of a plea agreement.⁵ Rogers agreed that he and Oliver were interested in having group sex with the victim and that they had provided the victim with “fake crack” cocaine to entice her to have sexual contact with them. Rogers testified that, after the victim realized that the crack was fake, Oliver struck the victim in the head from behind, strangled her, and put tape around her mouth and wrists. Rogers testified that the victim did not consent to having sexual contact with him or with Oliver and that Rogers knew that their conduct was wrong. Importantly, Oliver admitted to throwing the victim to the ground, to putting tape over the victim’s mouth, and to engaging in a sexual act with the victim. Given the overwhelming evidence of guilt, Oliver is not entitled to the relief that he seeks with respect to his ineffective assistance of counsel claim.

IV. ADMISSION OF EVIDENCE

Oliver next argues that the trial court abused its discretion by admitting photographs of a pellet gun that was found in Rogers’s home. We disagree.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ On July 29, 2020, Oliver’s motion to remand for a *Ginther* hearing was denied “without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar.” *People v Oliver*, unpublished order of the Court of Appeals, entered July 29, 2020 (Docket No. 352702).

⁵ Rogers pleaded guilty to two counts of third-degree CSC, MCL 750.520d, and was sentenced to four to 15 years’ imprisonment.

A. STANDARD OF REVIEW

“When the issue is preserved, we review a trial court’s decision to admit evidence for an abuse of discretion, but review de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility.” *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). “An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.” *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

B. RELEVANT AUTHORITY AND ANALYSIS

Generally, “[a]ll relevant evidence is admissible” MRE 402. “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Even where evidence is considered to be relevant, the evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” MRE 403. Notably, MRE 403 does not regulate evidence that is simply “prejudicial” because “[a]ll relevant and material evidence is prejudicial[.]” *People v Sharpe*, 502 Mich 313, 333; 918 NW2d 504 (2018). Rather, “[i]t is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded.” *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod by 450 Mich 1212 (1995).

There is, therefore, a two-part test under MRE 403: “First, this Court must decide whether introduction of [the] evidence at trial was unfairly prejudicial. Then, this Court must apply the balancing test and weigh the probativeness or relevance of the evidence against the unfair prejudice.” *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (quotation marks and citation omitted). “Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence.” *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126 (2010) (quotation marks and citation omitted). Stated differently, the “major function [of MRE 403] is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect” *Mills*, 450 Mich at 75 (quotation marks and citation omitted). Such concerns arise where “the tendency of the proposed evidence [is] to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *Cameron*, 291 Mich App at 611 (quotation marks and citations omitted). Additional concerns include “the danger of confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Watkins*, 491 Mich 450, 489; 818 NW2d 296 (2012) (quotation marks and citation omitted).

At the beginning of the third day of trial, the prosecutor and defense counsel indicated that there was a disagreement over the proposed admission of photographs of a pellet gun found in the bedroom where the sexual assault took place. Defense counsel objected to the admission of this evidence, arguing that the photographs had no probative value and that they were unduly prejudicial given that the victim did not testify that anyone used a gun during the commission of the crimes. The prosecutor argued that the photographs of the pellet gun were probative because they “corroborate[d] what [the victim] says about having seen a firearm with [Oliver and Rogers] in the past.” The prosecutor also noted that the photographs corroborated the victim’s testimony

that she was afraid on the day in question. The trial court held, “I’m going to allow it in but I’m certainly going to allow [the defense] to bring in the fact that it’s a pellet gun, not a . . . real gun.”

We conclude that the evidence concerning the pellet gun was relevant. The victim testified that she text messaged her sister after the crimes occurred to ask for help. The text messages were admitted into evidence and revealed that the victim had informed her sister that Oliver and Rogers had guns. Although the victim acknowledged that she had not seen any guns on the day in question, she testified that she had seen Oliver and Rogers with firearms in the past. Evidence concerning the pellet gun would therefore tend to support the victim’s credibility and would also explain why she informed her sister that Oliver and Rogers had guns on the day in question. Importantly, “[c]redibility of a witness is almost always at issue, and thus evidence bearing on that credibility is always relevant.” *People v Spaulding*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348500); slip op at 11.

While the photographs were prejudicial, there was no reason to believe that the photographs were *unfairly* prejudicial. There is no indication on the record that the photographs of the pellet gun were “merely calculated to arouse the sympathies or prejudices of the jury,” which would have suggested that they were *unfairly* prejudicial. *Mills*, 450 Mich at 76-77 (quotation marks and citation omitted). Indeed, the jury was informed that the pellet gun, which looked like a firearm, was “[n]ot an actual firearm” and that it merely shot pellets. Furthermore, there is no indication that the evidence was given undue weight. Oliver was convicted of CSC-I, unlawful imprisonment, and assault by strangulation. The victim’s testimony that these crimes were committed was corroborated by Rogers’s testimony, evidence of the victim’s injuries, evidence located in Rogers’s home, and DNA evidence. The evidence related to the pellet gun is merely one item supporting the victim’s version of events. Moreover, the evidence was not given undue attention during the trial and, as already stated, the jury was made aware that it was only a pellet gun—not an actual firearm. Therefore, we conclude that the evidence was not unfairly prejudicial.

Furthermore, even to the extent that there might have been some unfair prejudice, there is nothing in the record to suggest that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. As already discussed, evidence that a pellet gun was located in Rogers’s home was highly relevant to the victim’s credibility. Moreover, the victim testified that she did not see a gun on the day in question, and Oliver denied that he knew that a pellet gun was located in the home. Indeed, testimony supported that the pellet gun was concealed under some clothing and was not found until the police executed the search warrant. Moreover, the jury was aware that Oliver lived in Lansing and was merely visiting Rogers’s home on the day in question. In light of the significant probative value of the evidence, the trial court did not abuse its discretion by admitting the evidence.⁶

⁶ We note that Oliver cites MRE 901(a), which states as follows: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” However, Oliver does not argue that there was a lack of foundation concerning the photographs of the pellet gun. Rather, Oliver argues that photographs are irrelevant and that the probative value is

V. CONSECUTIVE SENTENCING

Oliver argues that the trial court abused its discretion by imposing a sentence for CSC-I consecutive to the other sentences. We disagree.

A. STANDARD OF REVIEW AND RELEVANT AUTHORITY

“[D]iscretionary sentencing decisions are subject to review by the appellate courts to ensure that the exercise of that discretion has not been abused.” *People v Norfleet*, 317 Mich App 649, 663; 897 NW2d 195 (2016). “In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by the statute.” *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). In this case, “MCL 750.520b(3) certainly authorizes a court to impose a CSC-1 sentence that runs consecutively to a sentence imposed for another criminal offense arising from the same transaction[.]” *Id.*

Where the Legislature has authorized consecutive sentencing, the trial court must articulate its rationale for its discretionary decision to impose consecutive sentencing such that the rationale facilitates appellate review. *Norfleet*, 317 Mich App at 664-665. In doing so, a trial court cannot speak in “general terms” regarding a “defendant’s background, his history, [and] the nature of the offenses involved.” *Id.* at 666 (quotation marks omitted; alteration in original). Rather, a trial court must “give particularized reasons—with reference to the specific offenses and the defendant—to impose each sentence[.]” *Id.* These requirements “help ensure that the strong medicine of consecutive sentences is reserved for those situations in which so drastic a deviation from the norm is justified.” *Id.* at 665 (quotation marks and citation omitted).

In this case, the trial court stated at sentencing:

Well, Mr. Oliver, in balancing [the] four goals [of sentencing,] to punish, to deter, looking at the protection of the community, looking at your individual rehabilitation, you present to the court at 42 years of age with no juvenile record, one felony, seven misdemeanors.

You know the court sat through this whole case and presided over a jury trial in this matter. So the, the, the court’s certainly had an opportunity to listen to all the facts, to appraise the credibility of the witnesses.

And one thing that was very clear to the court is that—I mean it’s one thing to have a sexual assault. It’s another when the victim is attacked. She was struck in the head. She was ultimately bound with duct tape. The, you know, her hands and her mouth. So there is a level of terror I, I, I think that goes beyond your

substantially outweighed by the danger of unfair prejudice. Therefore, any argument related to MRE 901(a) is abandoned.

admission that says, well this is just a, I was, I was doing this, you know, to, to control the victim.

I, I think that, you know, there was talk about, you know, hitting a like [sic] with her or, you know, whether she was going to be killed, you know. So there, so there was a, there was certainly a level of terror that went far beyond, you know, what the victim would otherwise have to experience in a sexual assault of this nature.

We conclude that the trial court presented adequate reasons to justify its decision to impose the sentence for CSC-I consecutively to the sentences for the other convictions. The trial court noted that, not only was the victim sexually assaulted, she was also attacked. Specifically, the trial court noted that Oliver hit the victim in the head, bound her hands with duct tape, and put tape over her mouth. The trial court stated that Oliver's conduct went beyond an effort to simply "control" the victim⁷ and that Oliver subjected the victim to further "terror" by discussing whether the victim would be killed. Because the victim experienced "a level of terror" beyond that which a victim of sexual assault would normally experience, the trial court concluded that a consecutive sentence was warranted with respect to the CSC-I conviction.

Oliver argues that the victim's purported terror was already taken into consideration by the guidelines. Specifically, Offense Variable (OV) 7, MCL 777.37, was assessed 50 points. A defendant is assessed 50 points for OV 7 when "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(a). When scoring OV 7, "[t]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *People v Hardy*, 494 Mich 430, 443-444; 835 NW2d 340 (2013).

Although the trial court clearly considered the fact that Oliver's conduct increased the fear and anxiety in the victim and that the conduct went beyond the minimum required to commit the offense of CSC-I, Oliver does not cite authority to support that conduct that is considered when scoring OVs cannot be considered when deciding whether to impose a consecutive sentence. Importantly, MCL 750.520b(3) grants the trial court the authority to impose a consecutive sentence. The only requirement is that the trial court provide an adequate explanation so that appellate courts can determine whether the trial court's actions fell within a range of reasonable and principled outcomes. See *Norfleet*, 317 Mich App at 664-666. We conclude that the nature of Oliver's actions and the recitation of those actions by the trial court at sentencing clearly show that the trial court met this standard.

Because the imposition of the consecutive sentence was within the discretion of the trial court and because the trial court adequately explained its reasons for imposing the consecutive

⁷ Oliver testified that he threw the victim to the ground and then put tape over her mouth in order to exert dominance over the victim. Oliver testified that he did so because the victim initially refused to leave Rogers's home after she discovered that the crack cocaine was fake.

sentence, we conclude that the trial court did not abuse its discretion. Consequently, contrary to Oliver’s arguments, defense counsel was not ineffective for failing to object to the consecutive sentence. See *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010) (“failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel”).

Oliver also argues that the judgment of sentence should be “corrected to reflect that the CSC conviction shall run consecutively to the other convictions,” which shall run concurrently to each other. We need not address this argument, however. After Oliver filed the instant appeal, the judgment of sentence was amended to indicate that Oliver’s sentences for unlawful imprisonment and assault by strangulation would be served concurrent to each other. Therefore, the issue is moot. See *People v Richmond*, 486 Mich 26, 34; 782 NW2d 187 (2010) (“It is well established that a court will not decide moot issues.”).

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford